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July 1, 2002

National Highway Traffic Safety Administration
Docket Management Facility
Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590

**Re: Docket No. NHTSA-02-12150** -14
**Notice of Proposed Rulemaking - Confidential Business Information**
**(49 CFR Part 512)**
**67 *Federal Register* 21198 (April 30, 2002)**

Dear Sir or Madam:

This comment is submitted responsive to the above-captioned notice of proposed rulemaking (NPRM), on behalf of the Motor and Equipment Manufacturers Association (MEMA) and the Original Equipment Suppliers Association (OESA) (collectively, the Associations), which this firm serves as counsel.

MEMA exclusively represents more than 700 North American manufacturers of motor vehicle components, tools and equipment, automotive chemicals and related products used in the manufacture, repair and maintenance of all classes of motor vehicles. OESA is MEMA's affiliate association exclusively serving as a voice for the original equipment supplier industry. OESA represents over 260 automotive suppliers, with global automotive sales of $280 billion.

## SUMMARY OF COMMENT

MEMA and OESA recognize NHTSA's legitimate interest in creating an efficient system for receiving, evaluating and, when appropriate, disclosing early warning reporting system information.

While MEMA and OESA members support the agency's proposed changes to Part 512 that are consistent with "current case law and legislative action," the Associations strongly object to the NPRM to the extent it fails to implement the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act's protection of early warning information from disclosure. The Associations also oppose the agency's proposals to (i) create new class determinations that would result in the routine disclosure of most early warning information; (ii) shift to submitters the burden of redacting personal information; and (iii) lower the threshold for triggering a duty to amend information submissions.

The Associations further request that NHTSA modify Part 512 to provide (i) additional time to submit requests for reconsideration of denials of confidential treatment requests, and (ii) a

mechanism by which third-party equipment suppliers can submit confidential business information directly to NHTSA.

## I. The NPRM Conflicts With TREAD Act Limits On Disclosure Of Early Warning Reporting System Data

MEMA and OESA strongly oppose the NPRM's proposed treatment of early warning information. The agency's proposal conflicts with the plain language of the TREAD Act, which provides that information obtained by NHTSA under the early warning reporting system (EWRS) is entitled to special protection. Section 3(b) of the TREAD Act, Pub. L. 106-414 (Nov. 1, 2000), codified at 49 U.S.C. § 30166(m)(4)(C), states:

> (C) *Disclosure.* None of the information collected pursuant to the [EWRS] final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.

Thus, Congress has provided that in return for requiring manufacturers to submit pre-investigative information to NHTSA as part of the new early warning reporting system, it would assure manufacturers that such information would not be regularly disclosed, absent a determination that disclosure would assist in carrying out the sections identified in subsection 4(C), which pertain to a *specific* investigation or proceeding involving a defect or noncompliance. Congress did not limit this protection to data that is otherwise considered "confidential," but, by the explicit language of subsection (4)(C), sought to grant this special protection to *all* information and data submitted pursuant to the early warning reporting system.

Proposed Section 512.23(a)(3) incorporates the relevant TREAD Act disclosure language, providing that "[e]arly warning information collected pursuant to regulations promulgated under section 30166(m) of title 49 . . . shall not be disclosed under this section, unless the Administrator determines the disclosure of information will assist in carrying out sections 30117(b) and 30118 through 30121 of title 49." 67 *Fed. Reg.* at 21206. By inserting this language within proposed Section 512.23, however, NHTSA would afford early warning information the benefits of subsection (4)(C) only if the information "has been claimed or determined to be confidential." Proposed Section 512.23(a) (67 *Fed. Reg.* at 21205). NHTSA's intent to apply the special protection of 30166(m)(4)(C) only to agency determined, "confidential" early warning data is outlined in the preamble to the NPRM, which states that early warning information, "if claimed or determined to be entitled to confidential treatment, shall not be disclosed under 30167(b) unless the Administrator determines that the disclosure will assist in carrying out Sections 30117(b) and Sections 30118 through 30121." 67 *Fed. Reg.* at 21201.

The agency reached a similar conclusion in a memorandum dated October 27, 2000, prepared by the Office of Chief Counsel, and placed in the early warning rulemaking docket (NHTSA-2001-8677) (the Memorandum). In that document, NHTSA attempts to support its interpretation of subsection (4)(C) by referring to certain remarks made by Representatives Markey and Tauzin, published in the *Congressional Record*, in which these legislators agreed that the "special disclosure provision for new early stage information is not intended to protect [information] from disclosure that is currently disclosed under existing law...." Memorandum at 3 (citing 146 *Cong. Rec.* H9629 (daily ed. Oct. 10, 2000) (statement of Rep. Markey)).

MEMA and OESA respectfully disagree with the agency's analysis of the TREAD disclosure clause. As noted above, neither Section 30166(m)(4)(C) nor Section 30167(b) contains a prerequisite of an agency grant of confidentiality. Further, the Memorandum's quotation of Rep. Markey has omitted significant language. Indeed, when the colloquy is considered in its entirety, it is consistent with the Associations' construction of the statute. The full statement, with which Rep. Tauzin agreed, states:

> Would the gentleman from Louisiana (Mr. Tauzin) agree that this special disclosure provision for new early stage information is not intended to protect from disclosure [information] that is currently disclosed under existing law *such as information about actual defects or recalls*?
> 146 *Cong. Rec.* H9629 (daily ed. October 10, 2000) (statement of Rep. Markey) (emphasis added).

These remarks confirm the TREAD Act's allowances for public release of early warning information with respect to actual defects or noncompliances, subject to the requisite NHTSA determination. In fact, the TREAD Act's "special disclosure provision" for early warning information, and the protections advocated by MEMA and OESA in these comments, do not alter NHTSA's pre-TREAD Act authority to disclose information related to a specific defect or noncompliance, whether obtained through an information request, the early warning reporting system or otherwise.

This is precisely what the TREAD Act's disclosure clause reference to Section 30167 accomplishes. The latter provides, in pertinent part, that

> ... [T]he Secretary shall disclose information obtained under this chapter *related to a defect or noncompliance* that the Secretary decides will assist in carrying out sections 30117(b) and 30118-30121 of this title or that is required to be disclosed under section 30118(a) of this title.
> 49 U.S.C. §30167(b) (emphasis added).

The Associations' view of the TREAD Act's disclosure clause also finds support in judicially-developed principles of statutory construction, which hold that statutory provisions should not be interpreted in a manner that would render them superfluous, meaningless or redundant. *See, e.g., C.F. Communications Corp. v. Federal Communications Comm'n*, 128 F.3d 735, 739 (D.C. Cir. 1997) (statutes must be construed "so that no provision is rendered inoperative or superfluous, void or insignificant"); *Dunn v. Commodity Futures Trading Comm'n.*, 519 U.S. 465, 472 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."). There is no other explanation for Congress's inclusion of Section 30166(m)(4)(C) in the TREAD Act, other than that Congress intended to limit disclosure of early warning information.

The Associations oppose the NPRM to the extent it would permit disclosure of any early warning information unless NHTSA makes the requisite determination under Section 30167(b).

## II. Class Determinations

### A. NHTSA's Proposed Presumptively Releasable Class Determinations Should Not Apply to Early Warning Information

NHTSA has proposed adding four class determinations to Appendix B of Part 512. Unlike the existing class determinations, which create presumptions that certain information would cause competitive harm if released, the proposed class determinations would create presumptions that consumer complaints, "reports and data" related to property damage claims and warranty claims, and compliance test data "would not cause competitive harm if released." 67 *Fed. Reg.* at 21206. NHTSA has also asked for comment concerning whether the agency should adopt "negative" class determinations for field reports and claims and notices of deaths and injuries. *Id.* at 21200. MEMA and OESA are concerned by the interplay between these class determinations and the agency's proposed treatment of early warning information, to the extent it would result in the routine disclosure of early warning information.

As explained above, MEMA and OESA believe Congress intended to protect all early warning information from disclosure, except when the agency determines that disclosure is necessary to carry out Section 31117(b) and Sections 30118 through 30121. Accordingly, the agency's proposed class determinations should not apply to early warning information. Insofar as NHTSA intends to apply these class determinations to early warning information and, therefore, to justify the public release of that data, the Associations believe NHTSA is exceeding its authority under, and violating the explicit language and intent of, the TREAD Act.

The Associations strenuously object to the creation of regulatory presumptions that unverified information regarding consumer complaints, property damage claims and warranty claims will not cause competitive harm if disclosed and, therefore, that such information is not entitled to confidential treatment. The volume, comprehensiveness and regularity of pre-investigative

early warning information reports distinguish these submissions--and the attendant confidentiality considerations--from the typically more narrow submissions made in response to investigative information requests. That NHTSA may have historically treated such information as non-confidential is therefore inapplicable in this context. In fact, the type of detailed and comprehensive data contemplated by the early warning reporting system is extremely valuable to competitors. Although, under the early warning reports NPRM, MEMA and OESA members would not initially be required to provide property damage, warranty and consumer complaint data, equipment suppliers (especially original equipment suppliers) would likely suffer serious competitive injury by the disclosure of vehicle manufacturers' claims data.

In candor, automotive replacement parts and equipment manufacturers are understandably interested in warranty data on original equipment and original equipment service parts. If this information is placed in the public record, these suppliers would undoubtedly benefit from such highly sought marketing intelligence. Even so, both the original equipment and aftermarket parts constituencies of MEMA and OESA, recognizing that at some point in the future NHTSA may propose to obtain and release their competitively sensitive warranty data, oppose the creation of a presumptively public classification for such information.

MEMA and OESA also oppose the adoption of "negative" class determinations for other categories of early warning information, such as claims and notices concerning deaths and injuries, and field reports. With regard to the former, the early warning reporting system under consideration would require equipment manufacturers to submit information to the agency whenever it receives a claim or "notice" (the latter, in the United States) that alleges that a manufacturer's equipment has caused a death. This information must be provided to NHTSA before it has been checked for accuracy, and before the manufacturer has even verified that the claim involves the manufacturer's product. To release this data publicly at such an early stage risks irreparable competitive harm, and injury to manufacturers' reputations and goodwill.

Similarly, the Associations oppose the adoption of a "negative" class determination for field reports. While these reports are often an invaluable source of information for companies in their efforts to improve product quality and performance, they are also often punctuated with inaccuracies, anecdotal information and unfounded speculation. Again, it would be unfair to publicly disclose such reports before the field information they contain has been verified. Moreover, the quality of these reports and any "early warning" benefits the agency expects to realize from them will likely be reduced if the agency engages in the routine disclosure of this information, providing further justification for protecting these reports from disclosure. *See, e.g., National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (explaining that, under FOIA Exemption 4, information should not be released if disclosure would result in the diminution of the reliability or quality of that information).

Given the TREAD Act's disclosure restriction and the proprietary overtones of the early warning report data sought by NHTSA, MEMA and OESA submit that "positive" classifications of presumptive confidentiality for all such early warning information should be established by the agency.

### B. Any Class Determinations Should Expressly Apply Only To Compelled Information Submissions

Under applicable case law, confidential business information that is voluntarily submitted to an agency should be granted confidential treatment under FOIA Exemption 4 if the information is of the type that is not customarily released to the public by the submitter. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). In other words, a company that voluntarily submits information to NHTSA need not establish, as a prerequisite to confidential treatment of that information, that release of the information will likely result in substantial competitive harm to the company.

Accordingly, the Associations request that NHTSA clarify that any class determinations adopted in the final rule pertain only to compulsory submissions.

## III. Duty To Amend

Under current Part 512, a party has a duty to amend a submission if the submitter "obtains information upon the basis of which the submitter knows that the supporting information was incorrect when provided, or that the supporting information, though correct when provided, is no longer correct and the circumstances are such that a failure to amend the supporting information is in substance a knowing concealment." 49 C.F.R. §512.4(i). MEMA and OESA believe the existing rule strikes a proper balance between the agency's need to have up-to-date information concerning the confidential status of a party's submission, and submitters' need to have finality with regard to submissions, subjecting them to penalties only if the failure to amend constitutes an intent to conceal.

The notice of proposed rulemaking would change this rule in a manner that, in practice, will create an onerous burden for submitting companies. The agency is proposing to subject submitters to civil penalties for failing to amend if "the submitter knows or becomes aware that the information was incorrect at the time it was provided to NHTSA, or that the information, although correct when provided to NHTSA, is no longer correct." 67 *Fed. Reg.* at 21204 (proposed § 512.10). In other words, instead of requiring an intent to conceal, a party would arguably be in violation of the proposed rule any time an employee of the company learns that previously confidential information has been publicly released and fails to so advise NHTSA. In order to avoid civil penalties, companies would be forced to create and maintain new procedures and systems to monitor the confidential status of information submissions for an indefinite period of time.

MEMA and OESA urge the agency not to adopt the proposed rule change. NHTSA has not indicated that the current system is being abused. We note that the public is not without a procedure for challenging the continued confidentiality of submitted materials at any time. If NHTSA believes that a change in the rule is necessary and appropriate, however, the Associations request that the final rule contain a time limit on the duty to amend. We believe the duty to amend should cease to apply after the investigation, rulemaking or other agency activity to which the submission relates is concluded. Like the current rule, this change strikes a proper balance between the agency's and the public's need for current, relevant information on the one hand, and the submitters' need for finality on the other.

## IV. Submitters Should Be Granted 30 days To Submit Requests For Reconsideration

Under proposed Sections 512.18 and 512.19 (67 *Fed. Reg.* at 21205), the agency proposes to carry over into the amended rule a requirement that a submitter whose request for confidential treatment has been denied file a petition for reconsideration within ten working days after receipt of notice of the denial. MEMA and OESA believe this time limit is too short, and should be lengthened in the amended rule.

Requests for reconsideration where sensitive company documents are otherwise at risk will often require the input of many company employees, including engineering staff, marketing staff, senior management, and legal counsel. The ten-day period under the current and proposed rules (which is equivalent to two calendar weeks if there are no intervening holidays) provides insufficient time for a company to conduct a reasoned evaluation of its arguments. Thus, the Associations request that proposed 49 C.F.R. § 512.18(b) be modified to prevent release of the subject information until "thirty (30) calendar days after the submitter of the information has received notice of the denial." This change would have the effect of extending the time to file a petition for reconsideration under proposed Section 512.19(a).

## V. NHTSA Should Adopt A Mechanism To Allow Confidential Submissions By Third Parties

NHTSA should amend Part 512 to provide a mechanism by which third parties can directly submit, and obtain confidential treatment for, confidential business information. Under 49 C.F.R. § 512.4(g), NHTSA has made it the responsibility of the submitter (such as a recipient of an agency information request) to obtain all relevant information and certifications in support of a request for confidential treatment of that information. In the past, this has not presented significant problems for vehicle manufacturers and their suppliers. In practice, a vehicle manufacturer receiving an information request relating to a part supplied by a third-party supplier would often request documents and information from the supplier in order to respond to the agency's information request.

Under current Section 512.4(g), the vehicle manufacturer is responsible for submitting a request for confidential treatment, along with any supporting documentation and certifications, for "third party" data supplied to the vehicle producer. This process is adequate when the subject information has been shared by the supplier with the vehicle manufacturer. However, in light of the increased use of so-called "black box" components and systems--i.e., self-contained electronic or mechanical products whose specifications and other details are not customarily provided by suppliers to vehicle manufacturers--suppliers' internal trade secret policies could be compromised by the third party disclosure system of Part 512, both in its current and proposed forms. By way of further examples of this concern, suppliers often do not wish to share such proprietary materials as detail drawings and specifications with their vehicle manufacturer customers.

MEMA and OESA therefore request that NHTSA adopt a procedure to permit suppliers or other third parties to submit such information directly to the agency. As "submitters" of such information, these suppliers (or other third parties) would have the right to protect their proprietary rights and to apply directly to the agency for confidential treatment of their own documents.

Accordingly, the Associations request that proposed Section 512.9 be amended to read.

> Where confidentiality is claimed for information in the possession of a third party or obtained by the submitter from a third party, such as a supplier, either the submitter or the third party may comply with §512.4 of this part, including a certificate in the form set out in Appendix A to this part.

Both the investigative and rulemaking contexts come into play here. The recommended revision would provide a means for NHTSA to obtain information it requires in the course of conducting an inquiry of a vehicle manufacturer, or considering rulemaking involving a vehicle system, while simultaneously protecting the third party supplier of information that the agency needs.

## VI. NHTSA Should Be Solely Responsible For Redacting Personal Information

Through proposed Section 512.5(c), NHTSA would "request" that submitters redact personal information from the public version of submitted materials. MEMA and OESA believe that NHTSA should be solely responsible for redaction of personal information. Shifting this responsibility to the industry would only result in confusion and uneven or inconsistent approaches by submitters, thereby compromising the agency's obligation to protect the personal privacy of individuals.

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MEMA and OESA appreciate the opportunity to provide comments on the Confidential Business Information NPRM.

Sincerely,

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Christopher H. Grigorian